

The Third Annual Report of the Indigent Legal Services Board

April 1, 2013 – March 31, 2014 (Fiscal Year 2013-2014)

“It will be an enormous social task to bring to life the dream of *Gideon v. Wainwright* - the dream of a vast, diverse country in which every man charged with crime will be capably defended, no matter what his economic circumstances, and in which the lawyer representing him will do so proudly, without resentment at an unfair burden, sure of the support needed to make an adequate defense.”

Anthony Lewis, Gideon’s Trumpet, chapter 13, p. 205 (Random House, NY, 1964)

“We had great faith and hope that the process we envisioned would breathe life into the guarantee of the right to counsel, that through our efforts, New York would be a vanguard state enforcing the rights of poor people. We sought to create a model for the nation that would provide the independence of defense lawyers and zealous representation of clients necessary to a fair criminal justice system. That was a long time ago. In the interim, New York State has neglected the public defense system that was created in 1965....

Public defense lacks sufficient funding. It also lacks standards, resources for recruitment, training, supervision and support services, statewide accountability, and most importantly, political and professional independence....”

Testimony by Michael Whiteman, counsel to Governor Rockefeller, quoted in STATUS OF INDIGENT DEFENSE IN NEW YORK: A Study for Chief Judge Kaye’s Commission on the Future of Indigent Defense Services, FINAL REPORT (June 16, 2006) at 3.

- **Executive Summary:** While this Third Annual Report of the Indigent Legal Services Board (ILSB) will document abundant activity by the staff of the Office of Indigent Legal Services (ILS or Office), and while it will identify specific advances toward improving the quality of representation under New York’s county-based and largely county-funded mandated representation system, its central message is that the State of New York, as of March 31, 2014, had yet to respond in a meaningful or satisfactory way either to Anthony Lewis’s explicit 1964 challenge, or to Michael Whiteman’s withering modern assessment. At no time was the inadequacy of the State’s response more telling than at the very end of March, 2014, when the final state budget appropriation for fiscal year 2014-2015 contained funding for none of

the major initiatives approved by the Board and proposed by the Office in its October 15, 2013 Budget Request (Attachment A), and further articulated in its presentation at the Joint Legislative Hearing on February 5, 2014 (Attachment B). Despite all the studies including the Final Report to the Chief Judge of the State of New York (Kaye Commission Report) on June 18, 2006; despite the recognition of severe systemic deficiencies by all seven Court of Appeals judges in *Hurrell-Harrington v. State of New York* (15 NY3d 8) on May 6, 2010; and despite the first detailed estimate of the true cost of bringing New York into compliance with national maximum caseload limits, the final state budget for FY 2014-2015 included no additional funding to provide counsel at arraignment in additional upstate counties; no additional funding to reduce caseloads and improve the quality of representation in the 57 upstate counties; no funding for the proposed Regional Support Centers that would provide state-funded expertise and assistance to beleaguered county-based providers; no funding for the proposed New York State Appellate Resource Center that would provide a level of assistance to county-based criminal defense providers similar to that which the state has long afforded to county prosecutors; and no funding to address the twin parent representation deficiencies of no early representation at the time one's child has been forcibly removed from the home, and no coherent system for providing effective representation to parents in counties which lie outside the geographic confines of New York City. The budget did include an increase of \$100,000 for the hiring of a badly needed Assistant Grants Manager.

I. **Significant Staff Activity:** During the year, the ILS staff and Board continued their efforts to "improve the quality of services provided pursuant to article eighteen-B of the county law[,] pursuant to Executive Law sections 832 (1) (Office) and 833 (1) (Board). Some of the highlights of those efforts are described below.

- Counsel at First Appearance: In August, 2013, the Office announced grant awards of \$12 million over a three-year period to 25 counties to begin providing counsel at a criminal defendant's first court appearance, where the prosecution formally begins, the right to counsel attaches, and bail may be set. Robert Lonski, head of the Bar Association of Erie County's assigned counsel plan, said "I know people think it doesn't make that big a difference to the resolution of the case, but the people who are saying that are not standing there with cuffs on." (New York Law Journal, "25 Counties Get Grants to Provide Counsel at Arraignments", August 8, 2013).

- Upstate Quality Improvement and Caseload Reduction: On August 22, 2013, the Office released its second competitive RFP, which invited every upstate county to apply for funding to either reduce excessive institutional defender caseloads, or improve the quality of its representation by other means. In March, 2014, the Office announced the grant awards of \$12 million over a three year period to 45 upstate counties. These grants were seen as the first step toward utilizing state funding to improve the quality of representation and reduce excessive caseloads, as was being accomplished in New York City under 2009 legislation. (New York Law Journal, "Counties Share \$12 million for Criminal Representation", March 24, 2014).
- Standards and Best Practices: During June and July, 2013, the Office convened two working groups. One, under the leadership of the Office's Director of Quality Enhancement for Appellate and Post-Conviction Representation, Risa Gerson, took on the responsibility of drafting Appellate Standards and Best Practices. The second, led by our Director of Quality Enhancement for Parent Representation, Angela Burton, was constituted as the Child Welfare Standards Workgroup. Both of these groups were composed of eminent practitioners and academics in their field. Each formed subcommittees, met regularly, and reached consensus on issues of significance. It is anticipated that both will produce Standards for approval by the Board during the 2014-15 fiscal year.

Also, on April 5, 2013, the New York State Bar Association Committee to Ensure Quality of Mandated Representation approved the ILS Standards for Trial Level Representation which had become effective on January 1, 2013, and incorporated those standards into its 2013 revision of its June 19, 2010 *Revised Standards for Providing Mandated Representation*.

- On November 15, 2013, the Office published its *Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York*. The key finding of this first-ever undertaking was that, for the year 2012, in order to comply with maximum national caseload limits, "New York would have had to spend an additional \$111,214,533 on indigent legal services in upstate counties." Thus, for the first time, the state was presented with a detailed, data-driven

estimate of the actual cost of remedying the persistent problem of excessive caseloads in upstate New York, in support of the ILS effort to bring those caseloads into compliance with national limits.

- Regional Immigration Assistance Centers: In January, 2014, the Office sent its draft RFP to the Office of State Comptroller for its review. At the end of the time period encompassed in this report, the RFP remained under review. We anticipate its issuance in the coming months. (Note: the RFP was issued on September 23, 2014, and proposals are due by December 18).
- Chief Defender Advisory Group: The ILS Director and staff members met with the CDAG on May 16 and October 17, 2013 in Albany. Among the topics considered were best use of state funding (both non-competitive quality improvement distributions and competitive grants); state-funded Regional Support Centers; the development of performance measures; the need for an increase in authorized payment levels for experts and investigators; incomplete or delayed discovery; and the special problems confronting Assigned Counsel Programs.
- List serves: The Office continued its outreach to providers by creating two practice area list serves, one for providers of representation in Family Court, and one for appellate practitioners. The latter may be expanded to include criminal trial attorneys in the coming year.
- Trainings and Professional Development: ILS staff members have participated with the New York State Bar Association (NYSBA), the New York State Defenders Association (NYSDA), the NYSBA Task Force on Family Court, the Child Welfare Court Improvement Project's Statewide Multi-Disciplinary Task Force, the American Bar Association's Parent Attorneys' Conference, the Center for Modern Courts, the National Legal Aid and Defender Association (NLADA), the National Association for Public Defense (NAPD), the National Association of Criminal Defense Lawyers (NACDL) and other organizations to present and receive training and to continually study and make efforts to improve the quality of representation for clients who are entitled to the assistance of counsel in criminal and Family Court cases, but who are unable to retain counsel.

- Assessment of Counsel at Arraignment: With the assistance of a summer intern, the Office's Director of Research began an internal study of the efficacy of providing counsel at arraignment in Ontario Country. He also brought added research value to the Office via his participation on the NLADA Research and Data Analysis Committee.

II. State Funding: At its September 26, 2013 meeting, the Board approved a budget request for FY 2014-2015 of \$99.5 million, an increase of \$16.7 million from the prior year appropriation of \$82.8 million.

Of this amount, \$96 million was sought for Aid to Localities, an increase of \$15 million. The increase was sought for additional caseload relief and support for assigned counsel programs (\$8 million); for providing counsel at first appearance in criminal cases (\$4 million); and for quality improvement and early representation for parent and other adult respondents in child protective proceedings (\$3 million).

The remaining \$3.5 million was requested under State Operations, an increase of \$1.7 million. Modest amounts were sought for the hiring of an Assistant Grants Manager and to award initial staff merit increases. \$1 million was requested to begin building and staffing our planned Regional Support Centers, and \$500,000 was sought for our planned New York State Appellate Resource Center.

Despite the Board's action, the Executive Budget for FY 2014-2015 did not include any increase, either in Aid to Localities or in State Operations. The final budget did include a \$100,000 increase to add the Assistant Grants Manager position. Thus, the final appropriation for FY 2014-2015 was \$82.9 million.

III. Four Essential Principles: As we have done each year, we wish to reemphasize the four key principles or actions that are essential to the ability of the Board and the Office to continuously improve the quality of mandated representation, as our statutory provisions command. They are:

- a) Sufficient Funding and the Elimination of Sweeps: There must be a significant increase in state funding in order to remedy the systemic defects identified by the Court of Appeals in its 2010 decision in *Hurrell-Harring v. State of New York*. The specific targeted reforms proposed by the Office and Board in each annual appropriation request should be funded. Finally, transfers or "sweeps" from the Indigent Legal Services Fund must cease. The monies in that Fund must be

preserved in full for their intended purpose of supporting improvements in the quality of legally mandated representation.

- b) Independence: The independence of the Office and Board from political interference is a centerpiece of Article 30, and adheres to the first of the American Bar Association's *Ten Principles of a Public Defense Delivery System*. It must continue to be scrupulously honored.
- c) State-Funded Regional Support: New York's county-based system cannot operate effectively unless it is supplemented by state-funded and ILS-operated Regional Support Centers. These centers would provide support to local providers with training, mentoring and supervision; expertise in appellate, family and criminal defense practice; and the facilitation of investigative, forensic and other necessary client services.
- d) Enforcement Authority: The Office and Board must be given the enforcement authority needed to assure uniformly high quality representation statewide. This includes the authority to approve assigned counsel and conflict defender office plans, and to enforce the standards and criteria established by the Office and the Board.

Dated: November 7, 2014

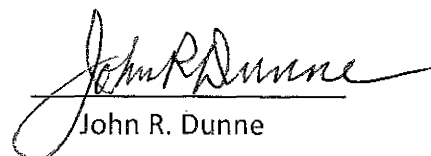

Jonathan Lippman, Chair

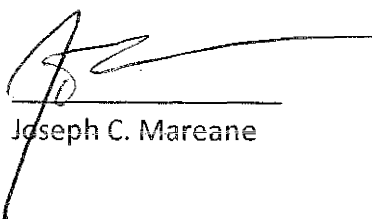

Michael G. Breslin

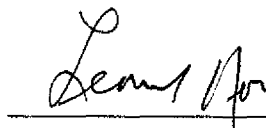

Carmen Beauchamp Ciparick



Sheila DiTullio


Vincent E. Doyle


John R. Dunne


Joseph C. Mareane


Leonard Noisette


Susan Sovie